(9)

No. 92-8556

IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

KENNETH O. NICHOLS,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals for the Sixth Circuit

MOTION FOR LEAVE TO FILE AND BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Is *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) binding authority?

2. If *Baldasar* is not binding, what standard should be adopted for the collateral use of valid uncounseled prior convictions?

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MOTION OF *AMICUS CURIAE* FOR LEAVE TO FILE BRIEF IN SUPPORT OF RESPONDENT

Pursuant to Supreme Court Rule 37.3, the Criminal Justice Legal Foundation respectfully moves for leave to file the accompanying brief *amicus curiae* in support of respondent in the above-captioned case. Counsel for respondent has consented, but counsel for petitioner has effectively refused consent by failure to respond to repeated inquiries.

In the accompanying brief, *amicus curiae* argues that *Baldasar* v. *Illinois* should be overruled.

INTEREST OF *AMICUS CURIAE*

The Criminal Justice Legal Foundation (CJLF) is a nonprofit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the constitutional rights of the victims and of society to rapid,

efficient, and reliable determination of guilt and swift execution of punishment.

Baldasar v. *Illinois* is a badly fractured opinion that has caused great confusion over the collateral use of valid uncounseled prior convictions. Furthermore, the standards advanced in *Baldasar* needlessly limit the use of valid uncounseled convictions in repeat offender schemes. The confusion and unnecessary limits on antirecidivist measures are contrary to the interests CJLF was formed to protect.

For the foregoing reasons, *amicus curiae* requests leave to file its brief.

December, 1993

Respectfully submitted,

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BRIEF *AMICUS CURIAE* OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

SUMMARY OF FACTS AND CASE

On December 10, 1990, defendant Nichols pled guilty to one count of conspiracy to possess with intent to distribute cocaine. *United States* v. *Nichols*, 979 F. 2d 402, 405 (CA 1992). Over defendant's objections, the district court considered his prior uncounseled misdemeanor conviction when calculating his criminal history score under the sentencing guidelines. *Ibid*. The prior was a 1983 drunk driving conviction for which Nichols received no jail time. In a split opinion, the Sixth Circuit Court of Appeals affirmed the sentence, holding that *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) did not prohibit the use of the uncounseled conviction. 979 F. 2d, at 415.

SUMMARY OF ARGUMENT

Baldasar v. *Illinois*, 446 U. S. 222 (1980) is not binding authority. In order for an opinion to be binding, it must contain legal reasoning that applies beyond the facts of the case. The *Baldasar per curiam* does not qualify because it contains no legal reasoning.

The *Baldasar* concurrences cannot be distilled into any majority position. Where separate opinions take the same basic approach towards the result, then the opinions can be placed on a spectrum of least to most expansive approach. In these cases, the opinion with the narrowest grounds controls.

Baldasar is not such a case because Justice Blackmun's opinion, that the conviction was invalid and therefore cannot be used to support a prison sentence, is irrelevant to the approach common to the other two concurrences, that valid uncounseled convictions cannot be used to increase prison sentences.

Baldasar's lack of authority has led to confusion in the lower courts. This can be remedied only if a majority of this Court adopts a single approach to the collateral use of valid uncounseled priors.

This Court should not adopt any of the *Baldasar* concurrences. Justice Blackmun's concurrence is based on overruling *Scott* v. *Illinois*, 440 U. S. 367 (1979), a view that was rejected by a majority of this Court. Therefore, it should not form the basis of any new standard.

The Stewart and Marshall concurrences should also be rejected. These concurrences are based on a misapplication of "but for" causation that is contrary to this Court's treatment of prior convictions. Their creation of hybrid, partially invalid convictions jeopardizes state recidivist schemes and is contrary to this Court's policy of limiting collateral attack on convictions.

The best approach is found in the *Baldasar* dissent. Allowing valid uncounseled priors to increase jail or

prison time is logically consistent with this Court's treatment of prior convictions, thus eliminating the species of hybrid convictions and the unnecessary complexities associated with them.

ARGUMENT

I. *Baldasar* is not binding authority.

In order for a court's decisions to have an impact beyond the law of the case, it is necessary for a majority of the court to support a particular rule of law necessary to the resolution of the case. Where there is no majority opinion " 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . . .' " *Marks* v. *United States*, 430 U. S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 15 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

This presumes, however, that there is at least some basic agreement on the reasoning supporting the result. When separate opinions share a common approach, then the opinions can be placed on a continuum, with the most narrowly reasoned opinion controlling. If, however, the opinions use entirely separate approaches to reach the result, then they cannot be reconciled because there is no common ground. *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) is such a case. While the defendant in *Baldasar* was able to get a majority of this Court to vacate his sentence, the separate opinions that form the majority cannot be reconciled to create a holding supported by a majority of the Court. This has caused great confusion among the lower courts trying to interpret it. See, *e.g.*, *United States* v. *Eckford*, 910 F. 2d 216, 219 (CA5 1990). The ambiguity and confusion surrounding *Baldasar* fatally undermines its value as precedent.

A. The Baldasar Opinions.

Baldasar v. *Illinois*, 446 U. S. 222 (1980) is a cursory *per curiam* opinion with three concurrences. The issue in *Baldasar* was whether an uncounseled misdemeanor conviction that did not result in prison time "may be used under an enhanced penalty statute to convert a subsequent misdemeanor into a felony with a prison term." *Id.*, at 222. The *per curiam* simply stated the facts and announced that such a use was impermissible "[f]or the reasons stated in the concurring opinions . . . ." *Id.*, at 224. The *per curiam* "contained no discussion of the relevant sixth amendment principles, relying instead on the analysis expressed in the three concurring opinions." *United States* v. *Eckford*, 910 F. 2d 216, 219 (CA5 1990). Therefore, any analysis of *Baldasar*'s scope must address these three concurrences.

1. The Stewart concurrence.

The first and briefest of the *Baldasar* concurrences is Justice Stewart's, which is joined by Justices Brennan and Stevens. It states that *Scott* v. *Illinois*, 440 U. S. 367 (1979) forbids sentencing an indigent defendant to prison unless the state provides him with counsel. *Baldasar*, *supra*, 446 U. S., at 224. It then reasons that defendant "was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid.* (emphasis in original). This, according to the concurrence, violated *Scott*. This was the extent of Justice Stewart's reasoning.

2. The Marshall concurrence.

The second and most expansive concurrence was the opinion of Justice Marshall, joined by Justices Brennan and Stevens. This opinion stated that *Scott* was contrary to the principles of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and *Argersinger* v. *Hamlin*, 407 U. S. 25 (1972) and

should be overruled. 446 U. S., at 225. As Baldasar's uncounseled misdemeanor conviction could have carried a prison sentence, it was invalid and could not be used to increase his sentence. *Id.*, at 226.

This concurrence also asserted that the sentence was invalid even under the rule of *Scott*. Paralleling Justice Stewart's reasoning, it adopted a "but for" approach to the uncounseled prior. "The sentence petitioner actually received would not have been authorized by statute *but for* the previous conviction." *Id.*, at 227 (emphasis added). The prior conviction, by being uncounseled, was insufficiently reliable to enhance a prison term even though it was otherwise valid. See *id.*, at 227-228.

3. The Blackmun concurrence.

The last and most narrowly reasoned concurrence was Justice Blackmun's. He stood by his dissent in *Scott* that whenever an indigent defendant is charged with a crime that is potentially punished by more than six months in prison, the state must provide him with counsel. 446 U. S., at 229. As Baldasar's uncounseled prior had a potential sentence of more than six months, it was invalid and therefore could not be used for enhancement. *Id.*, at 230. The concurrence did not state whether an otherwise valid uncounseled conviction could be used to enhance a prison sentence.

B. Making Sense of Baldasar.

When confronted with multiple opinions, the holding of a case can sometimes be found by finding the narrowest ground that is supported by a majority of the Court. *Marks* v. *United States*, 430 U. S. 188, 193 (1977). But this presumes that the various opinions can be placed on a spectrum of least to most expansive grounds. In *Marks*, the Court had to ascertain the holding of its separate opinions in *Memoirs* v. *Massachusetts*, 383 U. S. 413 (1966), overruled in *Miller* v. *California*, 413 U. S. 15

(1973). The lead opinion in *Memoirs* would invalidate anti-pornography laws that did not pass a three-part test, 383 U. S., at 418, while one Justice would only allow the prohibition of "hardcore pornography," *id*., at 421 (Stewart, J., concurring), and two Justices would have invalidated all anti-pornography statutes, *id*., at 421 (Black, J., concurring); *id*., at 426 (Douglas, J., concurring). These opinions fit into a relatively neat continuum, from the relatively narrow lead opinion, to Justice Stewart's broader interpretation of the First Amendment, to the very expansive absolutist approach of Justices Black and Douglas.

It was simple for the *Marks* Court to find a common ground in the *Memoirs* opinions. Since any legislation that failed the *Memoirs* plurality's test must also be invalid under the other opinions, this test "constituted the holding of the Court and provided the governing standards" for what the government could prohibit as obscene. *Marks*, *supra*, 430 U. S., at 193-194.

Another example of a continuum is found in *Furman* v. *Georgia*, 408 U. S. 238 (1972). Of the five Justices that made up the *Furman* majority, three Justices held that while the statutes before them were unconstitutional, the death penalty was not *per se* invalid, see *id*., at 241-242 (Douglas, J., concurring); *id*., at 306 (Stewart, J., concurring); *id*., at 310-311 (White, J., concurring), while the other two Justices would have held that the death penalty was *per se* unconstitutional, see *id*., at 286 (Brennan, J., concurring); *id*., at 359 (Marshall, J., concurring). These opinions had a common ground, that death penalty statutes could violate the Eighth Amendment, and an interpretive continuum from the least expansive position of Justices Douglas, Stewart, and White, to the most expansive absolutism found in the Brennan and Marshall opinions. It was thus a relatively simple matter to find the narrowest holding, the Douglas, Stewart, and White concurrences, and declare that to be the holding of

Furman. See *Gregg* v. *Georgia*, 428 U. S. 153, 169, n. 13 (1976) (lead opinion).

This cannot be done with *Baldasar*. Justice Blackmun's position, that the conviction was initially invalid and therefore cannot be used to support a higher prison sentence, is irrelevant to the interpretation of *Scott* that is common to the other two concurrences. It was well-settled before *Baldasar* that a conviction obtained in violation of defendant's right to counsel cannot be used to increase his punishment. See *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967). The common denominator of the other two concurrences was that even if an uncounseled prior is valid under *Scott*, it still cannot be used to enhance a sentence. *Baldasar*, *supra*, 446 U. S., at 224 (Stewart, J., concurring); *id*., at 225-226 (Marshall, J., concurring). Under Justice Blackmun's approach, however, an uncounseled conviction that carried a potential sentence of no more than six months and did not result in a prison sentence, would be valid when entered and acceptable to use as an enhancement, see *id*., at 229-230, but such a sentence would be unusable under the other two concurrences. Because Justice Blackmun's approach does not make *any* valid conviction unusable for subsequent enhancement, it cannot be reconciled with the views of the other four Justices to form a majority.

The other problem with attempting to reconcile Justice Blackmun's opinion with the other two concurrences is that his approach was rejected by a majority of the Court. Justice Stewart did not join in the Marshall or Blackmun opinions' condemnation of *Scott*. Instead, he implicitly reaffirmed *Scott* by using *Scott* as the sole means of analyzing Baldasar's sentence. See *id*., at 224. This vote, along with the votes of the four dissenting Justices, provide a majority for the continued validity of *Scott*. See *id*., at 224 (Stewart, J., concurring); *id*., at 230 (Powell, J., dissenting). As Justice Blackmun's only position was

rejected by a majority of this Court and is contrary to precedent, it cannot form the basis of any holding.

The only position besides the continued validity of *Scott* that commanded a majority of the Court was the particular facts of the case: a prior, uncounseled conviction for an offense that can be punished by more than six months imprisonment cannot be used to enhance a prison sentence. This is not, however, a rule of law. "A principled decision . . . is one that rests on reasons with respect to all the issues in the case, reasons that in their generality and their neutrality transcend any immediate result that is involved." Wechsler, Toward Neutral Principles of Constitutional Law, 73 Harv. L. Rev. 1, 19 (1959). *Baldasar* is a result, not a rule of law.

C. The Inevitable Confusion.

When this Court rules on an important issue but does not provide a holding supported by a majority of the Court, confusion is inevitable. It thus comes as no surprise that the fractured opinion in *Baldasar* has resulted in real confusion among the lower courts.

Many courts have applied *Baldasar* to forbid the use of all uncounseled prior misdemeanors "regardless of the punishment authorized for the prior misdemeanor and regardless of whether the defendant was actually imprisoned for the prior offense." Rudstein, The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U. Fla. L. Rev. 517, 532 (1982). These courts, however, overlooked the lack of a majority opinion in *Baldasar* and the divergence between Justice Blackmun's and the other two concurrences. *Ibid.*

Those courts that have analyzed *Baldasar* more closely have had much more difficulty applying it. Many of them have come to the same conclusion as *amicus*: *Baldasar* has no holding supported by a majority of this Court. See *United States* v. *Castro-Vega*, 945 F. 2d 496, 499-500 (CA2 1991); *United States* v. *Eckford*, 910 F. 2d 216, 219

(CA5 1990); *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 345 (CA7 1983); *United States* v. *Plisek*, 657 F. 2d 920, 925, n. 1 (CA7 1981); *United States* v. *Robles-Sandoval*, 637 F. 2d 692, 693, n. 1 (CA9 1981); *McClure* v. *Commonwealth*, 283 S. E. 2d 224, 225 (Va. 1981); *United States* v. *Mack*, 9 M. J. 300, 312, n. 11 (C. M. A. 1980). Confusion is the inevitable result of *Baldasar*'s failure to provide guidance.

One example of the confusion sown by *Baldasar* is found in conflicting treatments the Ninth Circuit gives it. In *United States* v. *Brady*, 928 F. 2d 844 (CA9 1991) one panel of the Ninth Circuit agreed with the Stewart and Marshall concurrences "that the constitutional rule enunciated in *Scott* also requires that an 'uncounseled misdemeanor conviction [may] not be used collaterally to impose an increased term of imprisonment upon a subsequent conviction.' " *Id.*, at 854 (quoting *Baldasar*, *supra*, 446 U. S., at 226 (Marshall, J., concurring)). Yet in *Robles-Sandoval*, *supra*, a different panel refused to use *Baldasar* to invalidate 8 U. S. C. § 1326, which makes it a crime to re-enter the United States after being deported. In rejecting the argument that a valid uncounseled deportation order cannot support guilt or enhance punishment under section 1326, the panel noted that "[t]he Court in *Baldasar* divided in such a way that no rule can be said to have resulted." 637 F. 2d, at 693, n. 1. *Baldasar* must be confusing for two panels on the same circuit to differ so dramatically over its interpretation.

Some courts have been unwilling to go beyond the specific facts of *Baldasar*. In *Castro-Vega*, the Second Circuit had to decide whether an uncounseled prior that resulted in no prison time could be used to calculate the criminal history category under the sentencing guidelines. *Castro-Vega*, *supra*, 945 F. 2d, at 499. As the facts of *Castro-Vega* differed from *Baldasar*, the Second Circuit did not feel constrained by this Court's decision. In *Baldasar*, "defendant's prior conviction materially altered the

substantive offense for which he could be held criminally responsible" by turning a misdemeanor into a felony. *Id.*, at 500. Although the uncounseled prior in effect increased defendant's sentence, the *Castro-Vega* Court did not feel bound by *Baldasar*. "In the absence of any clear direction from the Supreme Court, and given the narrowness of the *Baldasar* holding, we decline to extend *Baldasar* to this case." *Ibid.*

The Seventh Circuit took a similar approach in *Schindler*. *Schindler* dealt with a Wisconsin system that established a series of progressively higher penalties for each successive drunk driving conviction. 715 F. 2d, at 342. Defendant had suffered his third drunk driving conviction and was sentenced to the minimum prison term. *Id.*, at 341. The first violation is treated as a civil offense in Wisconsin with the only punishment being a fine. Because it was a civil offense, Wisconsin did not provide Schindler with counsel at his first conviction. *Id.*, at 342.

The Seventh Circuit found that *Baldasar* could not answer the question of whether prior uncounseled civil forfeiture proceedings may be used to increase a prison sentence. It found that the Marshall and Stevens concurrences were arguably against its use, the dissent favored its use, and Justice Blackmun's opinion took no position. *Id.*, at 344-345.

Left to its own devices, the Seventh Circuit found the closest case to be *Lewis* v. *United States*, 445 U. S. 55 (1980) which held a prior conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could still form the underlying felony necessary for the crime of possession of a firearm by a convicted felon. 715 F. 2d, at 345. The Seventh Circuit reasoned that, as in *Lewis*, the initial uncounseled conviction put "Schindler on notice that he was a high risk individual" and that subsequent violations of its policy against drunk driving would subject him to "criminal sanctions." See *id.*, at 346.

This rationale can be applied to any repeat offender scheme. The Illinois scheme in *Baldasar*, by punishing a petty thief lightly for the first offense, and more severely for subsequent offenses, also put first time thieves on notice that they were high risk individuals, subject to more punishment for later offenses. Yet the *Baldasar* Court invalidated this scheme.

Just because the same rationale can be applied to *Baldasar* does not mean that *Schindler* was wrongly decided. Lacking a majority opinion, *Baldasar* does not foreclose the decision in *Schindler*. What it demonstrates is that *Baldasar* does not provide adequate guidance to the lower courts.

The refusal to extend *Baldasar* by some lower courts exposes another source of confusion, the uncertain scope of the Marshall and Stewart concurrences. Both opinions focus heavily upon the causal connection between the uncounseled prior and the current sentence. See *Baldasar, supra*, 446 U. S., at 224 (Stewart, J., concurring); *id.*, at 227 (Marshall, J., concurring). There are, however, many uses for prior convictions other than recidivist schemes, but the Marshall and Stewart opinions do not address these problems. As demonstrated above, confusion is inevitable. An invalid uncounseled prior cannot be used at a sentencing hearing, see *United States* v. *Tucker*, 404 U. S. 443, 449 (1972), yet the *Castro-Vega* and *Schindler* Courts were able to find that *Baldasar* did not lead to a similar treatment of valid uncounseled priors. A similar problem is raised by impeachment. Invalid uncounseled priors cannot be used to impeach, see *Loper* v. *Beto*, 405 U. S. 473, 483 (1972), but the *Baldasar* concurrences are silent on this use of valid uncounseled priors. This Court must not repeat this mistake. Instead, it needs to announce a standard that will govern all subsequent uses of prior convictions.

II. A valid uncounseled conviction can be used to enhance a sentence without violating the right to counsel.

As *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) provides insufficient guidance over the proper use of valid but uncounseled priors, this Court will have to finish in the present case what it started in *Baldasar*. The place to start is the position taken in the Stewart and Marshall concurrences that the use of uncounseled priors to increase a sentence violates *Scott* v. *Illinois*, 440 U. S. 367 (1979); *Baldasar*, *supra*, 446 U. S., at 224 (Stewart, J., concurring); *id*., at 226 (Marshall, J., concurring). This approach has been adopted as the "holding" in *Baldasar* by many jurisdictions. See Rudstein, The Collateral Use of Uncounseled Misdemeanor Convictions After *Scott* and *Baldasar*, 34 U. Fla. L. Rev. 517, 532, n. 70 and accompanying text (1982). The Blackmun concurrence is an inappropriate source because it has been rejected by a clear majority of the court. See Part I B, *ante*, at 7.

The Stewart and Marshall positions do not appreciate the implications of *Scott*. Using *Scott* to invalidate constitutionally acceptable prior convictions turns this decision on its head. Therefore, this Court should reject them and look elsewhere for the proper standard.

A. Cause and Effect.

The single most important fact in *Baldasar* was that Baldasar's prior conviction was constitutionally valid when he was sentenced. Under *Scott* v. *Illinois*, 440 U. S. 367, 373-374 (1979) the government is not required to provide the accused with counsel if the accused is only convicted of a misdemeanor and is not sentenced to prison. Therefore, in 1975 when Baldasar was convicted for misdemeanor theft and not sentenced to prison, Illinois had done all it was required to do under the Constitution. *Scott* provided the sanction that rendered Baldasar's prior conviction valid.

The Stewart and Marshall concurrences used *Scott* to invalidate the conviction it sanctioned. Justice Stewart noted *Scott* prevented the state from imposing a prison sentence when no counsel was provided to the indigent defendant. *Baldasar* v. *Illinois*, 446 U. S. 222, 224 (1980) (Stewart, J., concurring). The concurrence then jumps from this premise to the result in *Baldasar* by taking a "but for" approach to Baldasar's felony conviction and prison sentence.

> "In this case the indigent petitioner, after his conviction of petit larceny, was sentenced to an increased term of imprisonment *only* because he had been convicted in a previous prosecution in which he had *not* had the assistance of appointed counsel in his defense." *Ibid*. (emphasis in original).

The problem with this reasoning is that it confuses necessary and sufficient conditions. The prior conviction, while necessary to turn petty theft into a felony, see *id*., at 223, was not sufficient by itself to send Baldasar to prison. In addition to the prior conviction, Baldasar also had to commit the current crime for which he was convicted before he was sentenced as a felon. Baldasar was not being punished again for his first offense. See *id*., at 227 (Marshall, J., concurring). Had he never committed the second offense, his first crime could not be used against him for sentencing. This is the same position taken by this Court when it rejected double jeopardy and *ex post facto* challenges to recidivist statutes. In rejecting *ex post facto* and double jeopardy challenges to a recidivist statute, this Court understood that

> "[t]he *fundamental mistake* of the plaintiff in error is his assumption that the judgment below imposes an additional punishment on crimes for which he had already been convicted and punished . . . .
>
> "But it does no such thing . . . . The punishment is for the new crime only, but is the heavier if he is an

habitual criminal." *McDonald* v. *Massachusetts*, 180 U. S. 311, 312 (1901) (emphasis added).

Justice Stewart's rationale flies in the face of this logic.

Justice Marshall attempts to rebut the argument with an old standard from the law of torts. "The sentence petitioner actually received would not have been authorized *but for* the previous conviction." *Id.*, at 227 (Marshall, J., concurring) (emphasis added).

This is contrary to this Court's treatment of causation and punishment. In *Lewis* v. *United States*, 445 U. S. 55 (1980) this Court held that a conviction obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) could still serve as the underlying felony necessary for the crime of possession of a firearm by a convicted felon. But for the uncounseled felony conviction, defendant could not have been convicted of possession of a firearm by a felon. See 445 U. S., at 56-58.

Yet the *Lewis* Court upheld the current conviction. It did not look to whether the invalid prior "caused" the current conviction. Instead it examined whether voiding the current conviction would advance the purposes served by *Gideon*. This Court found that the cases banning the use of invalid convictions for various purposes did so because of the unreliability of uncounseled convictions. *Id.*, at 67. As the reliability of the prior conviction was not as important to the statutory scheme in *Lewis*, the otherwise invalid conviction could supply a necessary condition for Lewis' present conviction. See *ibid*. This was premised on the conclusion that this "Court, however, has never suggested that an uncounseled conviction is invalid for all purposes." *Id.*, at 66-67.

If an unconstitutional conviction can be valid for *some* purposes, then a constitutional conviction must be valid for *all* purposes. As *Lewis* demonstrates, the fact that the valid prior may have helped to cause defendant's subsequent imprisonment is irrelevant. What matters is whether using the valid but uncounseled prior will erode

the principles of *Gideon*. See *Burgett* v. *Texas*, 389 U. S. 109, 114-115 (1967). "But for" causation is irrelevant to this inquiry.

B. Stretching the Right to Counsel.

Justice Marshall's concurrence in *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) asserted that preventing a valid uncounseled conviction from enhancing a sentence was simply an application of Sixth Amendment precedent. Therefore, "a rule that held a conviction invalid for imposing a prison term directly, but valid for imposing a term collaterally, would be an illogical and unworkable deviation from our previous cases." *Id.*, at 228-229.

Justice Marshall's thesis is not consistent with earlier right to counsel cases. By partially invalidating an otherwise valid conviction, the concurrence expands the right to counsel well beyond its past borders. This extension is unnecessary and contrary to the explicit commands of *Scott* v. *Illinois*, 440 U. S. 367 (1979). It therefore cannot support the assertions made in the Marshall or Stewart concurrences that valid convictions may not be used in sentencing simply because they are uncounseled.

Powell v. *Alabama*, 287 U. S. 45 (1932) began a significant expansion of the right to counsel. While the Sixth Amendment certainly extended the right to counsel beyond the common law guarantees, see *Argersinger* v. *Hamlin*, 407 U. S. 25, 30 (1972), there is "considerable doubt that the Sixth Amendment itself, as originally drafted by the Framers of the Bill of Rights, contemplated any guarantee other than the right of an accused in a criminal prosecution in a federal court to employ a lawyer to assist in his defense." *Scott*, *supra*, 440 U. S., at 370.

There were compelling arguments behind this Court's initial expansion of the right to counsel from *Powell* to *Gideon* v. *Wainwright*, 372 U. S. 335 (1963). Given the

high stakes involved in capital and other felony prosecutions, appointed counsel was essential to a fair criminal justice system. Cf. *Saffle* v. *Parks*, 494 U. S. 484, 495 (1990) (noting that *Gideon* is the exemplar of a "watershed rule").

Resistance stiffened as the defense attempted to expand this right to less important proceedings. An uncounseled capital conviction may, under certain circumstances, approach "judicial murder." See *Powell*, *supra*, 287 U. S., at 72. While misdemeanors did not invoke the same fears, actual jail time was a sufficiently harsh punishment to invoke the right to counsel. See *Argersinger*, *supra*, 407 U. S., at 37.

Until *Baldasar*, *Argersinger* was the high water mark of the right to counsel. In *Scott* v. *Illinois*, *supra*, this Court had to decide whether *Argersinger* was "to be a point on a moving line or a holding that the states are required to go *only so far* in furnishing counsel to indigent defendants." 440 U. S., at 369 (emphasis added). The *Scott* Court chose the latter interpretation, making *Argersinger* the outer limit of the right to counsel.

It noted that "constitutional line drawing becomes more difficult as the reach of the Constitution is extended further . . . ." *Id*., at 372. This problem is exacerbated by the incorporation doctrine, because "state and federal contexts are often different and application of the same principle may have ramifications distinct in degree and kind." *Ibid*. The *Scott* Court was therefore "less willing to extrapolate an already extended line when, although the general nature of the principle sought to be applied is clear, its precise limits and their ramifications become less so." *Ibid*. Therefore, the *Scott* Court "conclude[d] . . . that *Argersinger* [did] indeed delimit the constitutional right to appointed counsel in state criminal

proceedings."[1] *Id*., at 373. The Marshall and Stewart concurrences went beyond this limit. *Scott* sanctioned uncounseled convictions so long as defendants were not sentenced to prison. The *Scott* Court meant for the right to counsel to stop at this point. As in *Argersinger*, the *Scott* Court made sure that

> "every judge will know when the trial of a misdemeanor starts that no imprisonment may be imposed, even though local law permits it, unless the accused is represented by counsel. He will have a measure of the seriousness and gravity of the offense *and therefore know when to name a lawyer to represent the accused before the trial starts*." *Argersinger*, *supra*, 407 U. S., at 40 (emphasis added).

The Marshall and Stewart concurrences obscure the bright line established in *Argersinger* and *Scott*. These concurrences will make a trial court uncertain as to whether counsel should be appointed even if no jail time is contemplated. Even in those misdemeanor cases where counsel is not required, the desire to punish future offenses more severely may necessitate counsel. Substantially higher penalties for recidivist offenders is a common strategy, particularly when dealing with drunk driving. See, *e.g.*, *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341, 342 (CA7 1993). This unwarranted uncertainty is well beyond the limits set in *Argersinger* and *Scott*.

"We do not sit as an ombudsman to direct state courts how to manage their affairs but only to make clear the federal constitutional requirement." *Argersinger*, *supra*, 407 U. S., at 38. The Marshall and Stewart concurrences failed on both accounts. Their partial invalidation of priors that were valid under *Scott* and *Argersinger* need-

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1. Although the present case involves a federal prosecution, its impact will be felt by the state courts. As the bulk of criminal convictions come from the states, even many federal prosecutions will deal with prior convictions in state courts.

lessly interferes with state systems of punishing repeat offenders. By creating the threat of partially valid convictions, these opinions muddied up what had been a clear area. The present case provides this Court with the opportunity to restore clarity and reestablish the limits set in *Argersinger* and *Scott*.

C. Valid Convictions and Collateral Attack.

The collateral attack on constitutionally valid convictions advocated by the Marshall and Stewart concurrences is particularly inappropriate in light of this Court's previous treatment of prior convictions. This Court typically requires great caution before collaterally attacking a conviction. The Marshall and Stewart concurrences fly in the face of this essential principle.

Although collateral attack of a conviction is usually associated with habeas corpus, preventing the use of a final conviction in some subsequent proceeding is a collateral attack of the conviction. See *Lewis* v. *United States*, 445 U. S. 55, 67 (1980). Preventing the use of a prior conviction for sentencing renders the conviction partially invalid and is thus a form of collateral attack. See *Parke* v. *Raley*, 121 L. Ed. 2d 391, 404, 113 S. Ct. 517, 523 (1992).

This Court has been very careful to limit collateral attacks on convictions. Thus there is a " 'presumption of regularity' that attaches to final judgments," when they are collaterally attacked. *Id*., at 404, 113 S. Ct., at 523 (quoting *Johnson* v. *Zerbst*, 304 U. S. 458, 464 (1938)). It is unusual, to say the least, that a body of precedent that allows a state to presume convictions to be valid for sentencing under recidivist procedures could also prevent unquestionably valid convictions from enhancing sentences. The Stewart and Marshall concurrences cannot stand in light of this policy.

The deference towards prior convictions is reinforced in other collateral attack cases. In *Burgett* v. *Texas*, 389

U. S. 109 (1967) this Court was very careful to limit the means of collaterally attacking convictions to be used to prove guilt or enhance sentences. *Spencer* v. *Texas*, 385 U. S. 554, 559 (1967) reaffirmed the clear constitutionality of recidivist statutes. The *Burgett* Court distinguished its case from *Spencer* because the convictions used in *Burgett* had been obtained in violation of *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) and thus were "presumptively void." 389 U. S., at 115. They were not simply erroneous or voidable; they were void convictions. This stands in sharp contrast to the Stewart and Marshall concurrences, which would extend collateral attacks to valid convictions.

The purpose behind allowing uncounseled convictions to be kept from being used in subsequent proceedings is to prevent the erosion of *Gideon*. See *United States* v. *Tucker*, 404 U. S. 443, 449 (1972). Implicit in this rationale is that convictions which were obtained in conformity with *Gideon* and its successors *can* be used in subsequent proceedings. If Baldasar's prior convictions were obtained in conformity with *Gideon*, then how can *Gideon* be eroded by their subsequent use?

The Marshall concurrence attempts to answer this by asserting that because an uncounseled conviction cannot result in the direct imposition of a prison term it cannot be used to impose "a prison term collaterally." *Baldasar*, *supra*, 446 U. S., at 228-229. This argument unduly limits the role of sentencing courts. Sentencing is one of the most important parts of the criminal justice system, as it involves "application of the ultimate government power . . ." *Mistretta* v. *United States*, 488 U. S. 361, 413 (1989) (Scalia, J., dissenting). This Court has therefore been very leery of interfering with the sentencer's discretion to impose the appropriate sentence to fit each

individual defendant.[2] Given the importance of this decision "a judge may appropriately conduct an inquiry broad in scope, *largely unlimited* either as to the kind of information he may consider, or the source from which it may come." *Tucker*, *supra*, 404 U. S., at 446 (emphasis added).

The Sixth Amendment intervenes when "a sentence [is] founded at least in part upon misinformation of constitutional magnitude." *Id.*, at 447. When a sentencing court is provided with unconstitutionally uncounseled convictions, the defendant's background is "in a dramatically different light . . . ." *Id.*, at 448. What makes this difference is not the fact that the prior convictions were uncounseled, but that defendant had been "*unconstitutionally* imprisoned . . ." when he served time for his original conviction. *Ibid.* (emphasis added). Using the unconstitutional conviction for sentencing compounds the error.

Convictions that are valid under *Scott* v. *Illinois*, 440 U. S. 367 (1979) do not create an inaccurate sentencing profile. The convictions are constitutional, and there is every reason to believe that the sentencer will know that the priors were uncounseled. Admitting the valid priors simply furthers one of the most important requirements of the sentencing process—getting an accurate picture of defendant's criminal history.

Prohibiting the collateral use of convictions obtained in violation of *Gideon* prevents the state from profiting by its own illegality. This Court has long recognized the importance of "deterring lawless conduct by police and prosecution . . . ." *Lego* v. *Twomey*, 404 U. S. 477, 489 (1972). Under this banner this Court has excluded many of the fruits of illegal state activities. See, *e.g.*, *Mapp* v.

2. While there has been a move away from judicial discretion in sentencing, fitting the sentence to the individual defendant is still very important in many jurisdictions, including those with determinant sentencing schemes. See *id.*, at 366.

Ohio, 367 U. S. 643 (1961); *Wong Sun* v. *United States*, 371 U. S. 471 (1963). The Marshall and Stewart concurrences do not advance this cause. The state does nothing unconstitutional when it convicts an uncounseled indigent if the defendant is not sentenced to prison. *Scott*, *supra*, 440 U. S., at 373-374. Because there is no illegality for the state to profit by, the exclusionary rule advocated by the Marshall and Stewart concurrences is unnecessary.

As the *Tucker* Court noted, many facts are relevant to determining the proper sentence. A defendant's criminal history, his mental state, how he committed the offense, and a host of other factors can be used to increase a defendant's sentence. In capital cases, the Constitution permits a state to use evidence of defendant's future dangerousness or victim impact statements to help secure a death sentence. See *Jurek* v. *Texas*, 428 U. S. 262, 274-275 (1976) (plurality). *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 736, 111 S. Ct. 2597, 2609 (1991). Much of this evidence will come in forms that are neither as accurate nor as reliable as a conviction, even an uncounseled conviction. If the decision to impose a death sentence can be based in part upon a prediction as difficult as a future dangerousness finding, then a valid, albeit uncounseled, conviction can be placed before the sentencer.

D. Costs and Benefits.

As the right to counsel has extended beyond the original intent of the Sixth Amendment, see *Scott* v. *Illinois*, 440 U. S. 367, 370 (1979), this Court has increasingly turned to cost benefit analysis to determine whether a proposed extension of the right to counsel is proper. This involves "an analysis of the interests of the individual and those of the regime to which he is subject." *Middendorf* v. *Henry*, 425 U. S. 25, 43 (1976). As the Stewart and Marshall concurrences attempted to extend the Sixth Amendment through a reinterpretation of *Scott* v. *Illinois*, 440 U. S. 367 (1979), see Part I C, *ante*, at 8-11, their costs and benefits must be scrutinized. Careful

analysis shows that these opinions are not worth the minimal protection they afford defendants.

The benefits to individuals of the Marshall and Stewart concurrences are for the most part illusory. It is claimed that use of valid uncounseled priors must be limited because uncounseled convictions are not reliable enough to support a term of imprisonment. *Baldasar* v. *Illinois*, 446 U. S. 222, 227-228 (1980) (Marshall, J., concurring). This would thus protect the very important interest first protected in *Gideon* v. *Wainwright*, 372 U. S. 335 (1963) that an individual not be sentenced to prison without the protection afforded by counsel. See *Argersinger* v. *Hamlin*, 407 U. S. 25, 31-32 (1972).

In addition to problems with causation, see Part II B, *ante*, at 15-18, this argument underplays the role of counsel at the sentencing proceeding. Where, as in the present case, the prior conviction is a part of the evidence the judge considers, there is no doubt that counsel will bring to the Court's attention the fact that the prior conviction was uncounseled. Trial courts know as well or better than anyone else that misdemeanors can offer complicated factual situations and that the lack of counsel may limit the accuracy of the prior conviction. The knowledge of how a conviction was obtained will, of course, play an important part in the weight given to it by the sentencer. See *United States* v. *Tucker*, 404 U. S. 443, 448 (1972). Defendant's counsel will no doubt remind the sentencer that the priors were uncounseled and argue that they should therefore weigh less heavily against the accused.

Sentencers do not always have discretion when presented with prior convictions. Repeat offender schemes, such as the one in *Baldasar*, will establish a higher sentence or more severe range of sentences for the repeat offender, thus limiting the ability of the sentencing court to distinguish between counseled and uncounseled prior convictions. See, *e.g.*, *Baldasar*, *supra*, 446 U. S., at 223.

A convicted criminal, even one whose conviction was uncounseled, has no legitimate interest in avoiding the reach of a state's repeat offender laws. The only interest served by such a limitation would be making it less risky for a previously convicted criminal to commit future crimes. This interest is not served by the Constitution.

Furthermore, this Court has allowed an uncounseled felony conviction to classify a person as someone who is potentially dangerous and thus barred from possessing a firearm. See *Lewis* v. *United States*, 445 U. S. 55, 67 (1980). A valid but uncounseled misdemeanor conviction serves a similar purpose in repeat offender schemes. It classifies a person as one who is likely to commit a future crime and puts him on notice of more severe punishment if his mistake is repeated. Classifying a person as someone deserving heightened punishment is not a harm to be avoided by the right to counsel.

The burdens the Marshall and Stewart concurrences place on recidivist statutes constitute the most significant harm caused by these opinions. There is, of course, a strong and legitimate interest in punishing repeat offenders. See, *e.g.*, *Oyler* v. *Boles*, 368 U. S. 448, 451 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895). One of the most useful purposes served by these statutes is concentrating resources on repeat offenders. First-time offenders, particularly in misdemeanor cases, may be more susceptible to less formal procedures and less traditional punishments. Recidivist schemes free up scarce court and incarceration resources to be used for those who do the most harm, the repeat offenders. " 'Tolerance for a spectrum of state procedures dealing with [recidivism] is especially appropriate' given the high rate of recidivism and the diversity of approaches that states have developed for addressing it." *Parke* v. *Raley*, 121 L. Ed. 2d 391, 402, 113 S. Ct. 517, 522 (quoting *Spencer* v. *Texas*, 385 U. S. 554, 566 (1967)).

One example of this is the Wisconsin drunk driving scheme upheld in *Schindler* v. *Clerk of Circuit Court*, 715 F. 2d 341 (CA7 1983). Wisconsin enacted a very progressive scheme where a first offender was subject to an uncounseled civil proceeding where he could only receive a fine, but subsequent convictions would result in increasing prison terms. See *id.*, at 342; Wis. Stat. Ann. § 346.65(1) (West supp. 1993). Under this system the person who drinks too much and then drives one time is put on warning that he must stop this problem, while the more dangerous drivers are subject to sharply higher punishment.

This progressive scheme would not survive the Marshall and Stewart concurrences.[3] As in *Baldasar*, a prior uncounseled conviction that is not subject to prison time will be used to require a prison term for a subsequent offense. Compare *Baldasar*, *supra*, 446 U. S., at 223 with *Schindler*, *supra*, 715 F. 2d, at 342.

Thus, if the Marshall and Stewart concurrences prevail, Wisconsin would have to provide counsel for first-time drunk driving offenders if their recidivist scheme is to have any effect. Given the immense harm done by drunk driving, see *Michigan Department of State Police* v. *Sitz*, 496 U. S. 444, 451 (1990), stiff criminal sanctions for repeat offenders are essential, and the state would be derelict in its duty to protect public safety if it let three-time offenders off with the same light punishment currently given to first offenders.

However, given the minimal stakes of the first hearing in Wisconsin, providing counsel is likely to prove to be "burdensome, exorbitantly expensive, and completely unnecessary." *Schindler*, *supra*, 715 F. 2d, at 347. This may cause Wisconsin and other jurisdictions to abandon

3. The *Schindler* Court's decision to uphold the Wisconsin scheme, see *id.*, at 346, was not wrong because the Marshall and Stewart concurrences are not binding authority. See *id.*, at 345; Part I B, *ante*, at 5-8.

their graduated punishment policy and require jail time for all drunk driving offenses, since the state will have to provide counsel anyway. The Marshall and Stewart concurrences may thus cause states to jettison such "fair, intelligent, and reasonable" approaches to misdemeanors, and adopt a harsher, more punitive stance to the ultimate detriment of many misdemeanants. See *ibid.*

The Marshall and Stewart concurrences also deprive sentencing courts of useful information. Sentencing courts have a substantial interest in obtaining as much information as they can about defendant and the circumstances of his crime in order to fit the punishment to the crime and to the defendant. See *Parke* v. *Raley*, 121 L. Ed. 2d 391, 402, 113 S. Ct. 517, 522 (1992). Keeping constitutionally valid convictions from the eyes of the sentencing court prevents the sentencer from having a complete picture of defendant before rendering the sentence.

Against these substantial costs, the Marshall and Stewart concurrences advance few legitimate benefits for individual liberty. These concurrences are an attempt to extend the right of counsel beyond the limits set in *Argersinger* and *Scott*. See Part I B, *ante*, at 5-8. They have not justified going beyond this border. They impose substantial costs for illegitimate or ephemeral benefits. Therefore, they should be abandoned.

III. This Court should adopt the *Baldasar* dissent.

Since *Baldasar* v. *Illinois*, 446 U. S. 222 (1980) does not provide a majority opinion worth adopting, this Court must come up with an alternative. The best place to find the alternative is in the *Baldasar* dissent. Allowing valid uncounseled priors to be used in subsequent proceedings will clear this area of the law and give valid convictions the protection from collateral attack that they deserve.

A. Stare Decisis.

The fact that the *Baldasar* dissent was rejected by a majority of the Court for one reason or another does not hinder its adoption by this Court. The brief *per curiam* simply lists the facts and gives a result. It contains no legal reasoning that would warrant protection under *stare decisis*. See Part I B, *ante*, at 5-8.

Nor should the concurrences prevent the adoption of the *Baldasar* dissent. As they shared no common ground that bound a majority of this Court, see Part I B, *ante*, at 5-8, this Court cannot feel bound by the various *Baldasar* opinions. "As the plurality opinion . . . did not represent the views of the majority of the Court, we are not bound by its reasoning." *CTS Corporation* v. *Dynamics Corporation of America*, 481 U. S. 69, 81 (1987) (footnote omitted).

Even if some thesis that has majority support can be culled from *Baldasar*, it should be overruled. While this Court does not lightly overrule precedent, it will do so when a prior opinion is contrary to prior precedent, contains faulty analysis, and is difficult or confusing for lower courts to apply. See *United States* v. *Dixon*, 125 L. Ed. 2d 556, 577-578, 113 S. Ct. 2849, 2864 (1993); *Payne* v. *Tennessee*, 115 L. Ed. 2d 720, 738, 111 S. Ct. 2597, 2610-2611 (1991); *Solorio* v. *United States*, 483 U. S. 435, 450 (1987). As noted in Parts I and II of this brief, *Baldasar* and its attendant concurrences more than satisfy these conditions, and should therefore be overruled.

B. The Best Option.

The best option before this Court is to simplify the law by adopting the view of the *Baldasar* dissent that uncounseled convictions which are valid under *Scott* v. *Illinois*, 440 U. S. 367 (1979) can be used in sentencing just like any other valid prior conviction. See *Baldasar* v. *Illinois*, 446 U. S. 222, 231 (1980) (Powell, J., dissenting).

This position provides a clear, logically consistent standard that is congruent with this Court's precedents.

The best argument in favor of the *Baldasar* dissent is the simplest and most logical. If a constitutionally *invalid* conviction, see *Burgett* v. *Texas*, 389 U. S. 109, 115 (1967), cannot be used in sentencing, it logically follows that a constitutionally *valid* conviction should be permitted to enhance a sentence. See *Baldasar*, *supra*, 446 U. S., at 233 (Powell, J., dissenting).

This argument is premised upon a proper appreciation of the role of sentence enhancements and recidivism statutes. It is clear beyond all doubt that a person convicted as a recidivist or who has his punishment enhanced because of a prior crime is being punished not for his prior, but for his current crime. See *id.*, at 232; *Oyler* v. *Boles*, 368 U. S. 448, 452 (1962); *Moore* v. *Missouri*, 159 U. S. 673, 677 (1895). Because defendant is being punished for his current crime, the flimsy "but for" argument advanced in the Stewart and Marshall concurrences must collapse. See Part II A, *ante*, at 12-15.

This standard also avoids the twin problems of hybrid convictions and the prospective invalidation of constitutional convictions. As the *Baldasar* dissent points out, making uncounseled misdemeanors "valid for their own penalties as long as the defendant receives no prison term" but "invalid for the purpose of enhancing punishment" for a subsequent conviction turns these uncounseled misdemeanors into a special class of hybrid convictions separate from the rest of the law. *Baldasar*, *supra*, 446 U. S., at 232.

The dissent's approach also avoids a problem not addressed in the *Baldasar* concurrences: what to do about other uses of valid uncounseled priors. Invalid priors are not just prohibited from being used in sentencing; they are also barred from other uses such as impeaching witnesses. See *Loper* v. *Beto*, 405 U. S. 473, 483 (1972). Because the Stewart and Marshall concurrences rely so

heavily upon the "but for" causal connection between the prior conviction and the current punishment, it is unclear whether this position would apply to more attenuated uses of prior convictions such as impeachment. The *Baldasar* dissent avoids this problem with its clear, logical rationale that once a conviction is valid, it is valid for all subsequent uses. See 446 U. S., at 232-233.

By avoiding the prospective invalidation of convictions, the *Baldasar* dissent avoids another major source of confusion and frustration. Under the current regime imposed by *Baldasar*, a trial court confronted by an indigent accused of a relatively minor misdemeanor is confronted with a dilemma. It is placed in the unenviable position of either abandoning the recidivist threat for a large group of criminals, or of needlessly expending scarce resources on minor cases.

> "Providing counsel for all defendants charged with enhanceable misdemeanors will exacerbate the delays that plague many state misdemeanor courts and will impose unnecessary costs on local governments. Those communities that cannot provide counsel for misdemeanor defendants will lose by default the possibility of enhancing future sentences if criminal conduct persists. The result will be frustration of state policies of deterring recidivism by imposing enhanced penalties." *Id.*, at 235.

The *Baldasar* dissent returns *Scott* to its true meaning and allows courts to try uncounseled misdemeanor cases free of this problem. This is perhaps the greatest benefit of adopting the *Baldasar* dissent. Recidivist statutes are an important and respected part of our criminal justice scheme. See, *e.g.*, *Spencer* v. *Texas*, 385 U. S. 554, 555-556 (1967). Overturning the confusing scheme left by the *Baldasar* concurrences and replacing it with clarity of the dissent will remove the specter of uncertainty that hangs over many state recidivist schemes. It will do so by

replacing current ill-defined standards with the inescapable logic that a valid conviction retains its validity for all future uses.

CONCLUSION

The judgment of the Sixth Circuit Court of Appeals should be affirmed.

December, 1993

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